

Briley Marine and Michael A. Fuller, Case 15-CA-7875

30 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 5 November 1981 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with Decision and Order.

The judge found that the Respondent unlawfully discharged employee Michael Fuller because Fuller had filed a lawsuit under the Jones Act, 46 U.S.C. § 688, to recover compensation for a chemical poisoning injury he sustained while working for a former employer. Citing the Board's decision in *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980), the judge reasoned that Fuller engaged in protected concerted activity when he filed his individual claim because "the matter of compensation under the *Jones Act* arises out of the employment relationship and it is a matter of common interest to other employees" in the oil and gas related marine transportation industry. We do not agree with the judge's finding.

In *Meyers Industries*, 268 NLRB 493, 497 (1984), we held that "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In so doing, we overruled the precedent on which the judge relied in this case.

The record establishes that Fuller acted alone and solely on his own behalf when he pressed his claim under the Jones Act. Thus, the facts of the case do not support a finding that Fuller engaged

in concerted activity as defined in *Meyers*. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Morgan City, Louisiana, on July 31, 1981. The proceeding is based on a charge filed September 29, 1980, by Michael A. Fuller, an individual. The General Counsel's complaint alleges that Respondent Briley Marine violated Section 8(a)(1) of the National Labor Relations Act by discharging Fuller because of his concerted activities.

Briefs were filed by the General Counsel and Respondent. Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following findings.

I. JURISDICTION

Respondent engages in the offshore marine transportation industry and performs services valued in excess of \$50,000 for customers outside of Louisiana. It admits that at all times material herein it is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent operates a number of vessels engaged in transporting supplies and equipment to the offshore oil and gas industry in the Gulf of Mexico. On September 3, 1980, Charging Party Fuller sought employment with Respondent. He filled out an application form which included a question regarding his physical condition and "other" ailments. In response to the latter question he wrote "chemical poison on job with Offshore Logistics." John Caviness, Respondent's personnel manager, then asked Fuller when he was ready to go to work. After replying "right away," Fuller was given a physical exam. A few minutes later he was hired as a mate and told to report to Captain Drummond aboard the "Misty Briley."

While Fuller was getting his physical, Caviness called an employment service in New Orleans. This service caters to the marine transportation industry and provides a cross-check of the information contained in employment applications (especially with regard to the applicant's last or most recent past employer and information on whether past employers would rehire them). Information also is given regarding lawsuits involving former employers, and Caviness was informed that Fuller had filed a suit against Offshore Logistics. He was given the case number but he personally checked no further.

Fuller worked under Captain Drummond for 7 days at which time Drummond was replaced by Captain Weeks. All of Respondent's personnel were on an alternating schedule working 14 days and getting 7 days off. Fuller was on duty 6 hours and off 6 hours. His duties involved

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

handling the boat when the Captain was off duty. The rest of the crew was made up of an engineer, cook, and two deckhands. Fuller relayed orders from the Captain. Fuller was never told he had the authority to hire, discipline, or fire employees. He never exercised these functions and did not understand that he had such authority. If a problem arose while he was on duty he would wake the Captain.

Fuller completed his 14-day tour. He received no complaints regarding his work during this period and a termination was not mentioned at the time he went ashore.

About September 23, 1980, after his 7 days off, he contacted Keith Freeman, who replaced Caviness as Respondent's personnel manager, and asked if he was going back to the same boat at Intercoastal City. Freeman replied that the dispatcher did not want him back on the boat and that he was fired. Fuller said he did not understand why, as he thought every one had liked him. Fuller testified that he then called Captain Weeks, who in turn indicated he would call Bailey, Respondent's president. Fuller was given the impression that the call was made and that things would be straightened out. Fuller later called Bailey, who was not in, and was referred to Richard Hill who was Respondent's Marine superintendent. Fuller testified that Hill told him he did not know too much about the matter and would call Fuller back. Hill did not call back and Fuller again called Freeman. Fuller testified that Freeman then told Fuller that "he hated to be the one to tell me but that I was fired because of the lawsuit I filed with Offshore Logistics, back in 1977." Fuller again contacted Captain Weeks and told him of the reason given by Freeman. Fuller then testified that Weeks returned the call and told him, "They did do it. They fired you because of that."

Freeman admitted that he prepared Fuller's termination form and that he had rated Fuller's service as "excellent." When asked if he ever spoke with Fuller after termination he answered, "no sir." Upon further questioning, he remembered that he thought he talked to Fuller about what rehiring recommendation was to be made. Freeman stated he could not remember just exactly when because he dealt with quite a number of people. When asked if he told Fuller he was fired because of the lawsuit he answered, "no." He then recalled that the reason he had given Fuller was: "failure to pump calcium bromide and the boat was in run down condition." Freeman then testified that Hill told him Fuller was terminated because of "incompetent as a boat captain and recommended replacement by the company official." The latter statement was not explained further. Freeman testified that he thought the calcium bromide incident took place at the end of Fuller's tour; that Fuller and Drummond were notified of their termination about the same time at the end of their tour; and that Fuller and Drummond were together for the entire 14-day tour.

Hill was Respondent's marine superintendent during September 1980, but is no longer employed by the Respondent. He testified that it was his decision to fire the Charging Party and that he did so because one of Respondent's port captains had informed him that a customer had called to complain that the Misty Briley had re-

fused to carry calcium and that "Fuller said the boat was not able to handle it." Hill testified that he checked the capabilities of the boat "and then got back in touch with him and told him to carry it and he refused to." Hill assertedly made the decision to fire Fuller at the time the boat was called and told to carry the calcium bromide, but refused to do so. Hill had no idea when in Fuller's 14-day tour this incident took place. Hill further testified that he did not know of Fuller's lawsuit against Offshore Logistics until after this complaint was filed even though Hill was employed as a captain for Offshore Logistics during 1976 and 1977. Hill testified that "if I'm not mistaken, he [Fuller] alternated as mate and relief captain." He asserted that Fuller had the responsibility to see that the boat was kept up, but that nothing was ever done on the boat. Hill also testified that he "fired the other man who was also on the boat with him." This was Captain Drummond, but Hill did not remember his name, although he knew Drummond.

Although the Respondent indicated that it was a common practice to rotate those hired as captains and mates into status as captain, it is not shown that Fuller was employed other than as a mate. Respondent has a job list which includes a description of the captain's duties but not those of mates. The job list states that "a vessel has only *one* boss, and that is the Captain." It also states that "the engineer is in charge of taking on or discharging—bulk materials."

On rebuttal, Fuller testified that he played no role in the decision to reject the calcium bromide, that he knew nothing of the incident until told about it by Captain Drummond and the engineer, and that the incident took place during the first week of his 2-week hitch. Fuller was not on duty at the time of the incident and it was his understanding that the engineer was responsible for the loading of the chemical. Fuller also testified that, since September 1980, he has participated in the transportation of other chemicals for other employers without incident.

III. DISCUSSION

The issues in this proceeding are whether the Charging Party was employed as a supervisor within the meaning of the Act and thereby excluded from coverage under Section 2(11) of the Act; whether he was terminated because he had filed a lawsuit arising under the *Jones Act*, 46 U.S.C. § 688; and whether the latter activity was a protected concerted activity that would warrant a finding that Fuller's discharge was an unfair labor practice.

A. Supervisory Status

Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Although first mates properly may be found to be supervisors, *Joint Employers at the Port of Abbeville*, 175

NLRB 502 (1969), circumstances may justify a conclusion that a mate's functions actually are those of an employee. Contrary to the Respondent's contention that a mate is essentially a relief captain, I cannot find on this record that Fuller was employed in such a capacity. The Respondent did testify that it was its practice to rotate as captains those hired as either captains or mates; however, there is no indication that Fuller was made aware of this practice or that he was ever given the opportunity to assume the role of captain. If in fact Fuller was hired under those expectations, it appears that he would have been told so or that he would have taken over as captain after his first week aboard the *Misty Briley* when Captain Drummond completed his tour. Instead, Captain Weeks was brought aboard. Here, I find that Fuller's employment as a mate with the Company gave him the prospect of being promoted to captain but that it was not indicative of actual supervisory status, compare *Fred Rogers Co.*, 226 NLRB 1160 (1976).

As a matter of maritime custom a mate often enjoy a status as supervisor, however, the record here otherwise shows that Fuller had no apparent authority to hire, fire, or discipline employees and that he never exercised such authority to hire, fire, or discipline employees and that he never exercised such authority during his tour of duty. His direction of other crew members did not go beyond routine operating orders and the relaying of instructions from the captain. When any problem arose, Fuller called the captain, who was readily available, rather than exercising independent judgment and I find that the fact that Fuller held a captain's license and the title of mate is not controlling. The duties and authority possessed and actually exercised by Fuller were not those that are compatible with the Act's definition of supervisor and it is concluded that the Respondent has not shown that Fuller was a supervisor within the meaning of Section 2(11).

B. Reason for Termination

When Fuller applied for employment he disclosed that he had "chemical poison on job with Offshore Logistics." Personnel Director Caviness also obtained information from an employment service company that specifically identified Fuller's lawsuit against Offshore Logistics. Fuller then worked a full 14-day tour under two captains. He experienced no problems or complaints but after the customary 7-day period ashore he returned to receive the word that he was not wanted back. Although he initially was not given a reason, I credit Fuller's recollection that Freeman, the new personnel director, told Fuller that the firing was because of the lawsuit against Offshore Logistics.

Although questions designed to discredit his remembrance of events were asked of Fuller, I find that he was able to respond in a forthright manner and I credit his testimony regarding his impression of actions taken and statements made during the course of his employment and termination. Moreover, although Freeman denied telling Fuller that the lawsuit was the reason behind the firing, he also incorrectly identified the time when the alleged calcium bromide incident took place and the extent of Captain Drummond's tour of duty. I

also credit Fuller's recollection of having Captain Weeks confirm that the lawsuit was the reason behind the firing.

Accordingly, I find that the General Counsel has met his initial burden of making a prima facie showing that Fuller's lawsuit activity was a motivating factor in the employer's termination decision.

Clearly, the Respondent is chargeable with knowledge of the lawsuit based on Fuller's disclosure on his application for employment and on the information the Respondent obtained from its employment service company. While this information did not keep Caviness from hiring Fuller (the company was experiencing a shortage of qualified captains and mates), it may be inferred that after Fuller's immediate hiring (90 minutes after applying), some other person or persons in management became aware of Fuller's employment and of his past involvement in the Offshore Logistics lawsuit. I find that Hill, the Respondent's marine superintendent also must be considered to have had both actual and constructive knowledge of the lawsuit at the time he ordered that Fuller be fired. On direct examination by the Respondent, Hill was asked: "were you in a position when you were with Offshore Logistics to know about each and every lawsuit that may have been filed with Offshore Logistics at that time?" Hill's nonresponsive answer to this question was to the effect that the only thing he knew was that he drew a paycheck, spent 14 days on a boat, and was off for 7 days. This avoidance of acknowledgement must be viewed in the light of the otherwise pretextual nature of the reason given by the Respondent for Fuller's discharge as noted below and, accordingly, I find that Hill had knowledge of the lawsuit based on his employment with Offshore Logistics during 1977 and knowledge based on his position as superintendent with access to company records and information.

The Respondent has attempted to show that Fuller's discharge was justifiably based on an incident in which the *Misty Briley* refused to take on a load of calcium bromide. I credit Fuller's testimony that he was not on duty when the incident occurred, that he only heard about it after the fact, and that it occurred during his first week of duty. I further find that it was the engineer's responsibility to take on and discharge chemicals. There is no indication that the Respondent made any attempt to investigate Fuller's part in the incident and there is no reason given why the mate would be charged with responsibility when the Respondent's own job descriptions clearly direct such responsibilities to the engineer and captain. Also, Fuller was allowed to serve another full week of his 14-day tour under a new captain after the incident occurred and at the end of his tour he was not appraised of any complaint regarding the chemical-loading incident or any other problem.

Under these circumstances, I find that the Respondent seized on the chemical-loading incident as a reason to discharge Fuller because of the possibility that he would be inclined in the future to pursue a lawsuit against Briley Marine if some chemical loading accident or other incident occurred. This conclusion is buttressed by the Respondent's failure to investigate the incident and its failure to notify Fuller of any problems near the time of

the occurrence, at the end of Captain Drummond's tour, or the end of Fuller's 14-day tour, as well as the Respondent's failure to cite the leading reason when Fuller first sought to come back to duty, by the run around he received when he attempted to find out the reason for his discharge; by my conclusion that Fuller truthfully testified that he was informed by Freeman and Weeks that his prior lawsuit had been the reason behind his termination; and by my further conclusion that Superintendent Hill did not testify in an open and candid manner regarding the circumstances leading up to Fuller's discharge.

Under the circumstances, I find that the preponderance of the evidence supports a conclusion that the Respondent's asserted reason behind the discharge is pretextual and that the discharge would not have taken place in the absence of Fuller's action in pursuing his Jones Act lawsuit.

C. Nature of the Charging Party's Activity

The alleged unfair labor practice necessarily is related to the Charging Party's having been engaged in a protected concerted activity. Here, the critical activity was the filing of a lawsuit under the *Jones Act* against a former employee. Although the Board in *Hunt Tool Co.*, 192 NLRB 145 (1971), found this type of activity not to be protected, this decision specifically was overruled in *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (1980). The General Counsel persuasively argues that the rationale of *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978), relied on by the Board in *Krispy Kreme*, supra, is controlling. Here, I find that the matter of compensation under the *Jones Act* arises out of the employment relationship and it is a matter of common interest to other employees.

The Respondent, however, argues that the instant matter is distinguishable because the lawsuit involved here was against a prior employer and not the Respondent. I find that both employers are engaged in the same offshore marine transportation industry serving oil and gas operations in the Gulf of Mexico and that this industry is shown to be characterized by a large number of companies and a high rate of turnover and transfer by crewmembers. Moreover, the industry itself maintains a special interest in the past activities of prospective employees and their participation in lawsuits against fellow employers. This special interest is shown to exist by virtue of the information maintained and given out by employment service companies, which services apparently are designed to provide a clearing house type service for much of the industry. I conclude that an individual's action in pursuing a *Jones Act* claim has a potential effect on matters related to the safety and compensation of all

crewmembers in the industry, regardless of which boat or company they work for. I further find that to allow an employer the opportunity to deny employment to employees who pursue compensation claims would create a coercive climate that would inhibit other prospective claimants from pursuing such claims. I believe that information regarding such actions would be communicated in one way or another among the numerous crews serving the Gulf area and, accordingly, I conclude that prosecution of a *Jones Act* lawsuit is a protected concerted activity within the framework of the Board's policies.

Under these circumstances and on a review of the briefs and the entire record, I am persuaded that the General Counsel's position is supported by a preponderance of the evidence, see *Wright Line*, 251 NLRB 1083 (1980), and I find that the Respondent's discharge of Fuller on September 23, 1980, violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Michael A. Fuller on September 23, 1980, the Respondent engaged in an unfair labor practice in violation of Section 8(a)(1).

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that the Respondent be ordered to offer Michael A. Fuller immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed. It is also recommended that the Respondent be ordered to make Michael A. Fuller whole for the losses which he suffered as a result of his termination in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed by the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Moreover, in view of the nature of the Respondent's business and the fact that its employees are dispersed on numerous boats rather than being employed at a central location, it is considered to be necessary to order that a copy of the notice be posted aboard each boat in order to allow effective communication of the Board's policies to all of the Respondent's employees.

[Recommended Order omitted from publication.]